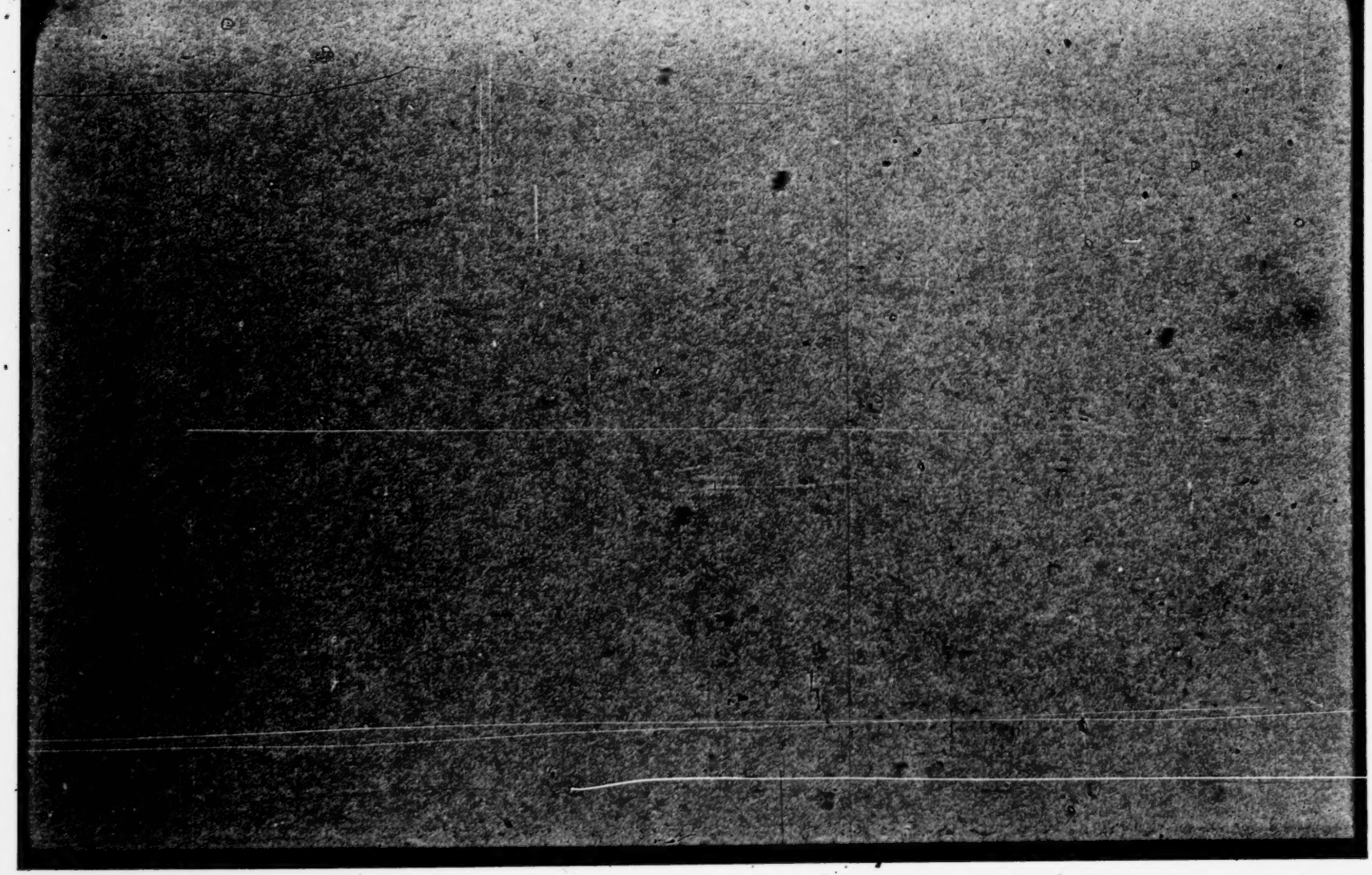

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. **No. 786**

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. NO.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel on behalf of the petitioner, Burns Mortgage Company, Inc., pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on the 19th day of September, 1933 (R. 39), affirming the judgment of the District Court for the Eastern District of Pennsylvania (R. 23). Rehearing was denied on the 15th day of November, 1933 (R. 57).

Questions Presented

A. Whether a federal court is bound by the Judiciary Act to follow a decision by the highest court of a State which interprets the Negotiable Instruments Act of that State?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

B. Whether a federal court fails to give full faith and credit to the Negotiable Instruments Act and a decision of the highest court of a State interpreting it when, in adjudicating rights created in that State, the federal court refuses to follow that decision because the statute is declaratory?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

C. Whether the requirement of a negotiable instrument for a sum certain is met in a note which provides for interest on principal at the rate of *"7 per cent per annum from date until fully paid. Interest payable semi-annually."*, and also that *"Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually"*?

The Circuit Court of Appeals decided that:

"Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due."

Statutes Involved

A. The 34th section of the Judiciary Act (Act of September 24th, 1789 C. 20 sec. 34, 1 Stat. 92; Revised Statutes sec. 721), which provides:

> ". . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

B. The 1st and 2nd sections of the Uniform Negotiable Instruments Act (adopted in every state jurisdiction and more particularly in Florida by Laws 1897 C. 4524; Comp. Gen. L. 1927, secs. 6760-6929), which provides:

> "§1. *Form of Negotiable Instrument.* An instrument to be negotiable must conform to the following requirements:
>
> . . . . .
>
> (2) Must contain an unconditional promise or order to pay a sum certain in money; . . .
>
> §2. *Certainty as to Sum; What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> (1) With interest; or
>
> (2) By stated installments; or
>
> (3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; . . . ."

Statement of the Case

The Burns Mortgage Company, Inc., as holder, brought an action in assumpsit in the United States District Court for the Eastern District of Pennsylvania, against Erwin M. Fried, the maker, upon a series of six promissory notes for $1,000.00 each, payable six months, one year, eighteen

months, two years, thirty months and three years after date, respectively (R. 2). The notes were executed, delivered and payable in Florida (R. 3). Each note provided for an interest rate on the principal sum "of 7 per cent per annum from date until fully paid. Interest payable semi-annually," and also provided that "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually" (R. 6, 7, 8, 9, 10 and 11).

The payee of the notes was the Golden Isles Corporation, which, prior to maturity, endorsed them in blank and delivered them for value to Walter Williamson (R. 3). The notes were not paid when due, and Walter Williamson subsequently transferred them by delivery to the plaintiff, Burns Mortgage Company, Inc. (R. 4).

The defendant in the lower Court filed an affidavit of defense raising questions of law, in the nature of a statutory demurrer, on the ground that the notes were not negotiable instruments in that they did not provide for a "sum certain."

Rulings of the Court Below

The District Court, in an opinion by Dickinson, D. J., determined that one who acquires a negotiable instrument after maturity can sue on it in his own name (R. 17). The Court held, however, that the notes in suit were not negotiable because they provided for the payment of interest prior to the maturity of the principal, and because they provided for interest at a higher rate on deferred interest payments (R. 18, 19).

The District Court, in an opinion by Dickinson, D. J., on Motion for Re-argument ignored without comment the contention of the plaintiff that, in determining the negotia-

bility of the notes, the Court must follow the law of Florida as decided by the Supreme Court of Florida, and denied the motion on the ground that there can be no certainty of sum if a note provides for interest payments prior to the maturity of principal (R. 22).

Judgment of *non pros.* was entered against the plaintiff by the District Court after the plaintiff declined to amend his suit in order to sue in the name of the payee as an assignee of an ordinary chose in action and subject to defenses available against the payee (R. 23).

The Circuit Court of Appeals, in an opinion by Thompson, C. J., affirming the judgment, held that even though the notes were executed in Florida, the Federal Court was not bound by a decision of the Supreme Court of Florida that such notes were negotiable under the Florida Negotiable Instruments Act (R. 36). The Court ruled that cases involving the negotiability of bonds having interest due prior to the maturity of principal were not in point because interest coupons were attached (R. 38). It also held that "Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due" (R. 37).

The Circuit Court of Appeals denied a Petition for Rehearing (R. 57).

Specifications of Error

1. The Circuit Court of Appeals erred in affirming the judgment of the Court below.

2. The Circuit Court of Appeals erred in denying the Petition for Rehearing.

3. The Circuit Court of Appeals erred in holding that in determining the question of negotiability of a promissory note executed, delivered and payable in Florida, the federal court was not bound by the construction of the Florida Negotiable Instruments Act by the Supreme Court of Florida.

4. The Circuit Court of Appeals erred in holding that the notes in suit were not negotiable.

Reasons for Granting the Petition

A. The decision of the Circuit Court of Appeals in this case is—as it itself admitted—directly in conflict with decisions in the Circuit Court of Appeals for the Fourth Circuit, in holding that:

> "The construction given by the state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts . . .
>
> "Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. v. Raleigh, 62 F. (2d) 705, *contra*." (Italics supplied.)

Because of this ruling, the Circuit Court of Appeals for the Third Circuit, although dealing with Florida contracts, refused to follow the decision of the Supreme Court of Florida in *Taylor vs. American National Bank*, 63 Fla. 631, 57 So. 678 (1913), which construed the Florida Negotiable Instruments Act, and the Circuit Court held that:

> "We must, therefore, determine the question of the negotiability of the notes in suit in accordance with what we find to be the general commercial law."

B. This decision by the Circuit Court in so far as it involves the construction of the 34th section of the Judiciary Act raises an important question of federal law heretofore not decided by this Court and probably in con-

flict with the tendency and the applicable decisions of this Court in

Swift vs. Tyson, 16 Pet. 1 (1842);

Lane vs. Vick, 3 How. 464 (1845);

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195 (1927);

Black & White Taxi Co. vs. Brown & Yellow Taxi Co., 276 U. S. 518 (1928).

The importance of this federal question is seen in these Law Review Articles:

Fordham, The Federal Courts and the Construction of Uniform State Laws (1928), 7 N. Car. Law Rev. 423.

Dobie, Seven Implications of Swift v. Tyson (1930), 16 Va. Law Rev. 225.

C. This decision by the Circuit Court is probably, in view of the tendency and applicable decisions of this Court, in violation of the "full faith and credit" clause of the Constitution because the Circuit Court, in dealing with a Florida cause of action, intentionally refused to give the same effect to the Florida Negotiable Instruments Act, and a decision thereunder, that would have been given in Florida.

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932);

Royal Arcanum vs. Green, 237 U. S. 531 (1915);

Converse vs. Hamilton, 224 U. S. 243 (1912).

This Court has held that the reason here given is not a ground for appeal but that it is a reason for which a petition for certiorari may be granted.

Bradford Electric Co. vs. Clapper, 284 U. S. 221 (1931).

D. The decision of the Circuit Court of Appeals, in holding that under general commercial law a promissory note is not negotiable if it provides for the payment of interest prior to the maturity of the principal sum and for interest on deferred payments, is in conflict with the great weight of authority on this question of general law. *All* decisions prior to the adoption of the Uniform Negotiable Instruments Act, cited to the Court below and representing the great weight of authority, have held that negotiability is *not* impaired by similar provisions for interest:

Commercial Nat. Bank vs. Consumers Brewing Co., 16 App. Dist. of Col. 186 (1900);

National Bank of North America vs. Kirby, 108 Mass. 497 (1871).

Cases decided subsequent to the Uniform Negotiable Instruments Act likewise have held such notes negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

No reported decisions have been found which take the view expressed by the Circuit Court of Appeals in the instant case.

E. The decision of the Circuit Court of Appeals is in conflict with the law of Florida where the cause of action arose. The Circuit Court refused to follow the decision by the Supreme Court of Florida in *Taylor vs. American National Bank*, 63 Fla. 631, 57 So. 678 (1913).

F. The Circuit Court of Appeals, in holding the notes non-negotiable, concluded that decisions of this Court to

the contrary, involving bonds with interest coupons attached, were not in point. But the decisions of this Court involving bonds:

Cromwell vs. County of Sac, 96 U. S. 51 (1877);

Railway Co. vs. Sprague, 103 U. S. 756 (1880);

cited with approval the following cases of ordinary promissory notes *without* interest coupons, similar to those involved in the case at Bar:

National Bank of North America vs. Kirby, 108 Mass. 497 (1871);

Boss vs. Hewitt, 15 Wis. 260 (1862).

The decision of the Circuit Court should be reviewed in the light of these applicable decisions of this Court.

G. The question of negotiability embodied in the instant appeal is of considerable moment and is not restricted to the notes involved in this suit. The same and similar printed forms are in common use, and heretofore have freely circulated as negotiable paper not only in Florida but also in many other States, including South Dakota, Washington, California, North Dakota and Arizona. Suits on notes similar in form are now pending in federal as well as state courts located in Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Suits on similar notes probably are pending in other jurisdictions throughout the United States.

This appeal is a test case by which counsel for the petitioner and other counsel who have joined with them desire to settle the status of tremendous amounts of capital invested in good faith by banks, corporations and individuals in thousands of notes similar to those involved in the instant case.

For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the United States:

In support of the petition for Writ of Certiorari, counsel on behalf of your petitioner respectfully submits the following:

Opinions Below

Two opinions were delivered by the District Court. They were written by District Judge Oliver B. Dickinson. An opinion *Sur* Statutory Demurrer was filed May 16, 1932 (R. 15) and an opinion *Sur* Motion for Re-argument was filed October 10, 1932 (R. 20).

The Circuit Court of Appeals delivered an opinion written by Circuit Judge J. Whitaker Thompson, filed on September 19, 1933 (R. 34). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 57).

The decision of the Circuit Court of Appeals is reported in 67 F. (2d) 352.

Jurisdiction

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938). The judgment of the Circuit Court of Appeals was entered September 19, 1933. Petition for rehearing was filed on October 17, 1933 (R. 40) and denied on November 15, 1933 (R. 57).

The Facts

The facts are stated in the Petition, page 3.

ARGUMENT

A. The decision is in conflict with holdings in another Circuit Court of Appeals.

The Circuit Court of Appeals made the following ruling, which controlled its final decision:

> "The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

It cited as authority for and against this proposition the following (R. 36):

> ". . . Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jockmus v. Clausen, 47 F. (2d) 766. . . .
>
> "Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. vs. Raleigh, 62 F. (2d) 705, *contra*. (Italics supplied.)
>
> "We find no precedent in the Third Circuit upon this question."

An examination of these authorities as well as other authorities reveals that the only prior actual holding by an appellate court on the issue here involved is that of the Circuit Court of Appeals for the Fourth Circuit in

Savings Bank vs. National Bank of Goldsboro, 3 F. (2d) 970 (C. C. A. 4th, 1925).

In that case the court expressly held that it was bound by a decision of the Supreme Court of North Carolina in the interpretation of the Uniform Negotiable Instruments Act adopted in that state (at page 973):

> "In such cases, the views and interpretation placed by the state's highest court upon its own statutes, passed within the inhibitions of the federal constitution, *will be accepted and followed, although questions of commercial law and jurisprudence may be involved* or incidentally arise . . . ." (Italics supplied.)

The position of that Court was recently re-affirmed in the case of

Niagara Fire Ins. Co. vs. Raleigh Hardware Co., 62 F. (2d) 705 (C. C. A. 4th, 1933).

where the Court said (at page 708):

> "The duty of the federal courts to follow state decisions in the interpretation of state statutes is too well settled to admit of serious discussion. The rule has been followed, not only with respect to statutes dealing with local matters, but also with respect to those affecting general commercial law, such as the Negotiable Instruments Law, which was dealt with in the case of Savings Bank of Richmond v. National Bank of Goldsboro, *supra*."

In view of the rule of the Fourth Circuit as above shown, it is significant to note that this Court on February 5, 1934, denied a Petition for Certiorari in the case of

Bank of United States vs. Cuthbertson, U. S. Sup. Ct., Oct. T. 1933, No. 691,

which arose in the Fourth Circuit (67 F. (2) 182, C. C. A. 4th, 1933). One of the grounds of the Petition was that the Federal Court sitting in North Carolina, in determining the negotiability of certain bonds, erred in its construction of the Illinois Negotiable Instruments Law, which it was bound to follow. However, in that case both petitioners and respondent agreed that the law to be applied by the Federal Court was the law of Illinois for the reason that the Negotiable Instruments Act was in effect in that state. The sole question in the Petition for Certiorari was whether or not the Federal Court had *correctly construed* the Illinois Negotiable Instruments Act in absence of an expressly controlling decision by the Supreme Court of Illinois. This is illustrated by the following quotation from respondent's brief (at page 3):

> "In the Circuit Court of Appeals the *respondent* insisted, and the petitioners conceded, that the question

> of negotiability was to be determined by the law of Illinois; and petitioners and respondent now agree that Illinois law controls. Moreover, considering only *one* of the grounds of non-negotiability urged by respondent, the Circuit Court of Appeals based its decision directly upon Section 1, Sub-section 4, of the Negotiable Instruments Act of Illinois (R 272);"

It appears, therefore, that this is a clear recognition of the principle that a federal court is bound to follow the interpretation by the highest court of a state of its Negotiable Instruments Act.

It is to be noted, as indicated above, that no Circuit Court of Appeals has rendered a decision in conformance with the decision in the instant case by the Circuit Court of Appeals for the Third Circuit. Thus in the case of

> **Mutual Life Ins. Co, vs. Lane, 151 Fed. 276** affirmed under the name of **Alexander vs. Lane, 157 Fed. 1002 C. C. A. 5th, (1907)** and certiorari denied, **208 U. S. 617 (1908),**

cited as authority by the court below, there was only a *per curiam* opinion of one sentence by the Circuit Court of Appeals for the Fifth Circuit, which affirmed the lower court on the basis of two other cases that have nothing whatsoever to do with the problem in the instant case. This *per curiam* opinion did not even mention the problem here involved. It is also significant that in the petition for certiorari in that case, which was denied by this Court, the question herein stressed was not even raised.

It can also be pointed out that in the case of

> **Peterson vs. Metropolitan Life Ins Co. 19 F. (2d) 74, affirmed 19 F. (2d) 88 (C. C. A. 8th, 1927),**

also cited by the Court below as authority, it was expressly conceded in the Circuit Court (at page 90) that the note was *non-negotiable* under the Uniform Negotiable Instru-

ments Law of Iowa, and, therefore, there was no discussion of the issue involved in the principal case.

It is not the purpose, however, of this brief to review all the purported authority on this question and to indicate the extent to which this authority is at most *dicta*. But we wish to point out that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is not only flatly in conflict with the holding of the Circuit Court of Appeals for the Fourth Circuit but also that it is in conflict with very strong *dictum* in the Circuit Court of Appeals for the Eighth Circuit, as seen in the case of

Kobey vs. Hoffman, 229 F. 486, 488 (C. C. A. 8th, 1916),

which involved the negotiability of a note executed and made payable in Missouri. Suit was brought in Kansas, and the Court said:

> "The Missouri Negotiable Instruments Law has never been construed by the Court of last resort of that state. We must therefore determine for ourselves how this statute should be construed. As the Negotiable Instruments Law, on that point, is practically a reaffirmance of the law merchant, the decisions of the Supreme Court of the United States control this court *until the highest court of the state—in this case that of Missouri—construes it*, and then it will only be authoritative on the courts of the United States as to notes and bills executed thereafter". (Italics supplied.)

We submit that since the decision of the Circuit Court of Appeals is in direct conflict with decisions in the Fourth Circuit and with very strong *dictum* in the Eighth Circuit, the Supreme Court should review the decision of the Third Circuit in the instant case in order that this question may be conclusively adjudicated.

B. The decision of the Circuit Court is an unwarranted extension of the doctrine of Swift vs. Tyson.

The Petitioner is cognizant that *Swift vs. Tyson* is an old story with this Court but, nevertheless, in order to show that the decision of the Circuit Court in the instant case is an extension of that ruling, it is necessary to direct the attention of the Court to the following statement by Judge Story in that case (at page 18):

> "In all the various cases which have hitherto come before us for decision this court has uniformly supposed that the true interpretation of section 34 limited its application to state laws strictly local, that is to say, *to the positive statutes of the state and the construction thereof adopted by the local tribunals,* and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character . . ." (Italics supplied).

This Court has continued to follow that interpretation of section 34 of the Judiciary Act, which provides as follows:

> ". . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

It is not the purpose of this Petition to obtain leave to attack *Swift vs. Tyson.* Its purpose is to seek a final determination on the question of whether the doctrine of that case should be *extended*—as it admittedly has been by the Circuit Court in the case at bar—further than has ever been indicated by any decision of this Court. It will, therefore, be shown: (1), In what manner the decision of the Circuit Court is an extension; and (2), that the extension is unwarranted.

Swift vs. Tyson dealt with the negotiability of a note under the law merchant. No statute was involved. In deciding that the federal court would determine for itself the negotiability of the note, Judge Story expressly stated, as seen in the quotation above, that the rule would be *otherwise* if a statute were involved. That has always been the construction of Section 34 adopted by this Court, as evidenced by the following quotation from a recent opinion of this Court written by Mr. Justice Holmes:

> ". . . no case has yet gone the length of undertaking to correct the construction of State laws by State Courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the Legislature."
>
> **Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 199 (1926).**

Nevertheless, the Circuit Court has held in the instant case that it need not follow the construction of a state statute by the Supreme Court of that State. It admitted that if the statute had *modified* or *changed* the common law it would have been bound by the construction of the State Court. It held, however, that since the statute in question—the Florida Negotiable Instruments Act—is merely declaratory of the law merchant, it is not the type of statute which comes under the rule laid down in *Swift vs. Tyson*. Thus, notwithstanding the express language of *Swift vs. Tyson* and the general understanding and expression of the Supreme Court, as seen in the above statement by Mr. Justice Holmes, the Court below, in determining the negotiability of Florida notes, has refused to follow the decision by the Florida Supreme Court interpreting the Florida Negotiable Instruments Act.

It is obvious, therefore, that the Circuit Court has extended the doctrine of *Swift vs. Tyson*. The next question is whether this extension is warranted to such an extent that this Court should allow the decision to stand without reviewing it.

The time honored doctrine of *Swift vs. Tyson* has been criticized on the bases of historical research, modern conception of law in its philosophical sense, the self-centered personality of Judge Story, and statistics which have shown the part played by this decision in the overcrowding of the federal courts. None the less, *Swift vs. Tyson* is still the law, and Petitioner does not seek to attack it. It must be remembered, however, that all the criticism and arguments against *Swift vs. Tyson* apply with even greater force against the extension of that doctrine. It is with this very thought in mind that Mr. Justice Holmes, in one of his dissenting opinions, indicated the attitude of this Court upon the extension of this doctrine by the following concise and pointed statement:

> "I should leave *Swift vs. Tyson* undisturbed as I indicated in *Kuhn vs. Fairmount Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."
>
> **Black & White Taxicab vs. Brown & Yellow Taxicab, 276 U. S. 518, 535 (1928).**

The very cause of the rule of *Swift vs. Tyson* in so far as questions of general commercial law is concerned, does not apply where any kind of state statute is involved. The reason for that decision was the then existing conception of the common law as a perfect system of law under which one and only one correct answer to any legal problem was possible. In light of this conception, it was but natural that a court of wider jurisdiction, more significance and greater powers, would make its own determination of what the common law was rather than follow the

opinion of another court. However, this cause for the rule does not apply once a statute is involved because "the law" is that statute, and "the law" is not the general principles of a "system of law".

Thus, although *Swift vs. Tyson* involved negotiable instruments, it was decided at a time when no state had any comprehensive statute governing negotiable instruments. But at present every state, including Florida, has seen fit to supplant general principles of commercial law by the adoption of a positive statute—the Negotiable Instruments Act. Though the Negotiable Instruments Act is to a great degree a codification of general commercial law principles, the various legislatures deliberately adopted this comprehensive statute to be the basis for deciding all questions of negotiable instruments. As a statute, it necessarily becomes the first and authoritative point of inquiry for determination of any problem the facts of which come within its scope. The statute has become the law of the state adopting it, regardless of the *precedent* the legislature followed in formulating it.

The Negotiable Instruments Act was created by legislative process, the same as any other statute. The mere fact that it is comprehensive and to a large extent an adoption of prior commercial law principles, does not take away its character as a "positive statute" designed to be the sole authority for future court decisions in the particular State. And whatever "construction" is placed on that statute by the highest tribunal of that State must be followed by the federal courts.

But under the Circuit Court's decision in the instant case different consequences will result depending upon the precedent followed by the legislature in formulating the statute. It may be suggested at this point that the decision of the Circuit Court raises a number of queries

which themselves reveal the error in the decision: By whom, and by what test, is it to be determined whether a statute is merely declaratory of general law? Will this be determined by the federal court or by the state court? Will it depend on whether the statute itself says it is declaratory, or will it depend upon whether the particular provision looks like the rule which existed prior to the statute?

The Circuit Court of Appeals made no analysis of this problem, and it is submitted that as a result its very decision reveals what appears to be a *non sequitur*, if not an actual inconsistency. The Court held that (1) State decisions construing the Negotiable Instruments Act need not be followed by the federal courts because the statute was declaratory of the law merchant; and (2) under the law merchant the notes were not negotiable. The Court failed to take into consideration any of the decisions upon the question of the negotiability of these notes rendered under the Negotiable Instruments Act. These decisions, as pointed out *infra*, at page 32 *et seq.*, have held that the notes *are* negotiable. It follows, therefore, that if, as the Court below ruled, under the law merchant these notes were *not* negotiable, then the Negotiable Instruments Act is *not* declaratory of the law merchant. Conversely, if the Negotiable Instruments Act is declaratory of the law merchant, and under it the notes are held negotiable, it must follow that the notes *were* also negotiable under the law merchant. We submit, therefore, that since the reasoning of the Court below is fallacious under either of the two possible alternatives, its conclusion is erroneous.

The public significance of the decision of the Circuit Court cannot be over-emphasized. In recent years, there have been great advances in the codification of the common law. Uniform laws have been adopted on diverse subject

matters in all the states. One of the earliest and probably the most important of these laws is the Uniform Negotiable Instruments Act. If this decision of the Circuit Court is permitted to stand, its effect will be tremendous. In cases involving questions of bills and notes, sales, bills of lading, partnerships, stock transfers, and all the other subjects which have purportedly been unified, we will soon find the assertion of different law within the very same jurisdictional boundaries depending on whether a federal or a state court renders the decision. Such a condition would be especially deplorable in the field of bills and notes, the utility of which is based upon freedom in circulation, which in turn depends upon known legal rights that go with them.

It is for these reasons that a conclusion exactly opposite to that of the Circuit Court of Appeals is reached in two Law Review articles directly in point:

> "Our conclusion is that the doctrine of Swift and Tyson should not be applied in the construction of uniform state laws. It is required neither by consideration of authority nor by policy."
>
> **Fordham, the Federal Courts and the Construction of Uniform State Laws (1928) 7 N. Car. L. Rev. 423.**

> "It is believed, therefore, that as a solution of the immediate problem, the rule of compulsory conformity on the part of Federal Courts to the State construction of Uniform State Laws should be followed."
>
> **Dobie, Seven Implications of Swift vs. Tyson (1930) 16 Va. L. Rev. 225.**

The instant case shows still another feature which makes the problem even more acute. The notes in suit were executed and delivered in Florida. They were also payable in Florida. Authorities all agree that under the

rules of Conflict of Laws the law of Florida governs upon the question of the negotiability of these notes.

Restatement of Conflict of Laws, Proposed Final Draft No. 2, Sec. 360 (Am. L. Inst. 1931) states:

> "The law of the place of contracting determines whether a mercantile instrument is negotiable."

If suit on a note is brought in a state court in any state of the Union, the rights of the parties are uniform because Florida law governs. But if suit is brought in a federal court in the same territorial boundary, opposite rights may prevail. This would place a litigant, whose claim is large enough to warrant federal jurisdiction and where there is a diversity of citizenship, in a position to change his substantive rights by choice of the forum, even though the law of the particular State, whose decisions ordinarily would govern the instrument in question, had been positively fixed by both statute and court interpretation. If suit were brought on a note in a state court of another state, the decision, following the law of the state where the instrument was made, might be one way, and if suit were brought or removed to a federal court sitting in the same state, the decision would be entirely different. This would be a travesty on justice. No one would know what the rights of the respective parties are until litigation was completed. The Circuit Court has recognized the importance and necessity of certainty in so far as *the sum* is concerned. But it appears that in its over-zealousness on that score the Court has overlooked the great importance of the certainty of *the law* which is to govern the rights of the parties.

For the reason, therefore, that this decision of the Circuit Court is an unprecedented and unwarranted extension of *Swift vs. Tyson* which is fraught with far reaching consequences it is submitted that this Court should review the decision and reverse it.

C. A federal court violates the full faith and credit clause of the constitution where, in determining rights created in a state, it refuses to apply a decision by the highest court of that state interpreting its statute, and where this refusal is based upon the reason that the statute is merely declaratory.

In 1912, the Supreme Court of Florida decided that under the Florida Negotiable Instruments Act, adopted in 1897 (Fla. Laws 1897 C 4524; Comp. Gen. L. 1927 §§ 6760-6929), certain interest provisions in a promissory note would not render it non-negotiable:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In 1925, the notes in suit, containing interest provisions similar to those in the case decided by the Supreme Court of Florida, were made, executed and delivered in Florida. They were also payable in Florida. Prior to maturity, without notice of any defects and for valuable consideration, they were negotiated. Then they were acquired by the plaintiff, a Florida corporation, for a valuable consideration. Upon suit on these notes, the District Court for the Eastern District of Pennsylvania and the Circuit Court for the Third Circuit refused to apply the aforesaid decision of the Supreme Court of Florida which had held these interest provisions would not render the notes non-negotiable. Under their own interpretation of the law merchant the federal courts below held the notes were *not* negotiable. Its refusal to apply the Florida decision, the Circuit Court said, was because the Florida Negotiable Instruments Act was a declaratory statute and not a statute which changed the law merchant.

The opening section of

Article 4 of the United States Constitution

provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The question here is whether the Circuit Court has given "full faith and credit" to the "public acts, . . . and judicial proceedings" of the State of Florida.

It is, of course, no longer open to question that a federal court, like a State Court, must comply with the "full faith and credit" clause:

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932).

This same case has reiterated the principle long ago adopted that full faith and credit must be given to State statutes. Since full faith and credit had to be given to statutes, it was but natural to hold that full faith and credit must be given to decisions interpreting those statutes:

Royal Arcanum vs. Green, 237 U. S. 531 (1915);
Converse vs. Hamilton, 224 U. S. 243 (1912).

A reason for this conclusion is seen in this statement by Mr. Justice Holmes in

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 200 (1926):

> "The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the Legislature."

Then also is there this very forceful statement by Mr. Justice Field in the case of

Louisiana vs. Pilsbury, 105 U. S. 278, 294 (1881):

> "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts

made under the Act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. *So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it.*" (Italics supplied.)

The notes in suit became binding obligations in accordance with the laws of Florida. The Circuit Court did not deny this. It held, however, that because the Florida Negotiable Instruments Act was declaratory of the law merchant, a federal court did not have to give the same effect to its construction as if it were a statute that changed the law merchant. Upon what does the Circuit Court base its distinction as to the effect that must be given to state statutes? In Florida the same effect is given to its statutes irrespective of the historical development or precedent behind the Statute, and irrespective of whether the statute codified or changed its common law. It is submitted, therefore, that when the Circuit Court gave less effect to the Florida Negotiable Instruments Act because of a distinction which is not recognized in Florida the Circuit Court failed to give "*full faith and credit*" to a "*public act*" of the State of Florida.

The Circuit Court failed to give full faith and credit not only to a "public act", but also to "a *judicial proceeding*" of the State of Florida. The Florida Supreme Court had held similar notes negotiable under the Florida Negotiable Instruments Act. The Circuit Court expressly re-

fused to follow the decision. This was in violation of the full faith and credit clause as stated by this Court in

American Surety Co. vs. Baldwin, 287 U. S. 156, 166 (1932):

"The full faith and credit clause, together with legislation pursuant thereto, applies to judicial proceedings of a State Court drawn in question in an independent proceeding in the Federal Courts."

The basis of petitioner's contention is not that the Circuit Court has erroneously *construed* the Florida Negotiable Instruments Act or decisions thereunder. If that were so, it is recognized that, as stated by Mr. Justice Brandeis by way of footnote in the recent opinion in:

Ohio vs. Chattanooga Boiler, 289 U. S. 439, 443 (1933):

"Had the question been merely the construction of the Statute, no issue under the full faith and credit clause would have arisen."

Thus, in one of the cases cited for that proposition:

Banholzer vs. New York Life Ins. Co., 178 U. S. 402, 406 (1900),

this Court said:

"The ruling was a construction of the Statute, *not a denial of its validity,* and that the Court meant no more, and meant to follow, *not oppose,* the decisions of the State, is evident from its Opinions." (Italics supplied.)

And, in another case, also cited by Mr. Justice Brandeis:

Pennsylvania Fire Ins. Co. vs. Gold Issue Min. & Mill Co., 243 U. S. 93 (1917),

this Court said:

"There is nothing to suggest that it was not candidly construing the Colorado Statute to the best of its ability, and, even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article 4, §1".

It will be noted that in the case at bar, as pointed out above, the issue is not whether the Circuit Court has *misinterpreted* the Florida Negotiable Instruments Act, nor is it whether the Circuit Court has *misinterpreted* the Florida decisions construing the Florida Negotiable Instruments Act. The issue here is whether the Circuit Court erred in *refusing to follow* a decision which it expressly *recognized* settled the law in so far as Florida or a Florida Court was concerned.

Furthermore, Petitioner wishes to point out that under this argument it is not resorting to the "full faith and credit" clause in order to have this Court become a final arbiter of questions of *conflict of laws* even though it has been suggested that such a result is being approached by decisions of this Court:

Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. Law Rev. 533.

In the instant case that position need not be taken. It is not contended that the Circuit Court has violated any principle of conflict of laws. The Circuit Court did not deny that Florida Law governs the substantive rights resulting from the negotiability of a note. The error of the Circuit Court, it is submitted, was committed when it decided that it could determine the question of negotiability for itself, and that it need not follow a Florida Supreme Court decision that interpreted the Florida Negotiable Instruments Act, giving as its reason a supposed distinction between declaratory and non-declaratory statutes, which distinction, as pointed out above, is not recognized in Florida.

Refusal by a federal court to give full faith and credit to a state decision interpreting a state statute because the statute is declaratory of the common law is not only a denial of a constitutional right, guaranteed by Article 4, § 1, but will have the effect of destroying the very purpose of these uniform statutes, which is to create uniformity in the law throughout the country. It is, therefore, urged that this is another reason why this Court should review and reverse the decision of the Circuit Court.

D. Under the law merchant notes are not rendered non-negotiable by provisions for interest to become due before maturity of principal and for interest at a higher rate on deferred interest payments.

It should be noted at the outset that the instruments in question are the familiar printed form of notes which are commonly used in many jurisdictions, including Arizona, California, Florida, North Dakota, South Dakota and Washington. It is a form adapted and used for long term obligations. It is also commonly used in the above jurisdictions as a substitute for the familiar bond and warrant which accompanies the real estate mortgage.

Inasmuch as these are long term notes, and in view of their utilization as investments, a very important feature is their provision for interest. After many years the form of the notes in suit was found best to carry out the expediencies of commercial trade. The commercial advantages of these notes are easy to explain. Interest being an important factor of any credit transaction, the interest provisions in the notes are primarily aimed to obtain the prompt payment of interest. This is done in two ways: (1) by providing for periodical payments of interest; and (2) by providing for a higher rate of interest on deferred interest payments, *i. e.*, interest not paid when due.

The sole question here is whether these provisions, which are aimed at the prompt payment of interest, make the sum uncertain and, therefore, render the notes non-negotiable. Certainty of sum has always been recognized as a requisite of a negotiable instrument. In ancient days, whether the purpose of the instrument was to provide credits in places to which the transportation of valuable gold and silver would be difficult or whether the purpose of

the instrument was to enable one to get a quick summary judgment in the merchant's court at the town fair, the reason for the rule was clear—the instrument must speak for itself. This same reason exists today. It should be noted however, that provisions aimed toward the *fulfilling* of the obligation do not render the sum uncertain. Outstanding examples of this are provisions accelerating maturity for non-payment of part of the obligation as it becomes due and provisions for attorneys' fees. These provisions caused some difficulty prior to the Uniform Negotiable Instruments Act, but now it is clear that such provisions do not deprive a negotiable instrument of its essential character as "a courier without luggage".

With this commercial background, we can better approach the problem from a legal standpoint. The interest provisions in the notes, as above indicated, have a two-fold aspect and, therefore, we shall treat each of them separately.

The provisions of the Uniform Negotiable Instruments Act, also adopted in Florida, applicable to certainty of sum, are:

"§1. *Form of Negotiable Instrument.* An instrument to be negotiable must conform to the following requirements: • • •

(2) Must contain an unconditional promise or order to pay a sum certain in money; • • •

§2. *Certainty as to Sum; What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:

(1) With interest; or

(2) By stated installments; or

(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; • • •

(a) Interest payable in installments before maturity of principal.

Both the District Court (R. 22) and the Circuit Court of Appeals (R. 37) held, *without citing any authority whatsoever*, that there can be no certainty in a note providing for semi-annual payments of interest before the maturity of the principal because, in the language of the Circuit Court of Appeals:

> "How can the sum due be said to be certain when there is nothing upon the face of the notes to indicate the amount of the semi-annual interest payments due to the holder."

Both courts cited the case of *First National Bank vs. Bosler*, 297 Pa. 353, 147 Atl. 74 (1929), but the District Court expressly stated as to the doctrine of that case:

> "It is not on all fours with the instant case upon the question of whether or not the instrument here sued upon is negotiable."

Similarly, the Circuit Court of Appeals merely stated that it was in accord with the "reasoning and conclusion" in that case but it by no means considered that case as an authority on the question of the negotiability of a note providing for semi-annual interest.

The total lack of any common law authority in support of the Circuit Court's view is aptly indicated by the case of

Commercial Natl. Bank vs. Consumers Brewing Co., 16 App. D. of C. 186, 199 (1900),

wherein the Court of Appeals of the District of Columbia said:

> "Agreement is apparently universal, also, that stipulations for the payment of interest at stated periods, before the maturity of the principal, do not impair negotiability."

In addition to this case the decision of the Circuit Court conflicts with at least two other decisions rendered prior to the Uniform Negotiable Instruments Act:

National Bank of North America vs. Kirby, 108 Mass. 497 (1871);

Boss vs. Hewitt, 15 Wisc. 260 (1862);

and with at least four decisions subsequent to that Act:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912);

Commercial Savings Bank vs. Schaffer, 190 Ia. 1088, 181 N. W. 492 (1921);

Continental etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

In every one of these cases interest was payable in installments *before* the maturity of the principal, and nevertheless in each case the note was held negotiable.

Thus, in the Florida case the principal was due two years after date but interest was *payable quarter-annually.* The Supreme Court of Florida, after citing the Florida Negotiable Instruments Act, said:

> "It will be observed that the note for $2,250.00, purchased by the appellee, as alleged in the bill of complaint *is for a sum certain,* and would be, under the provisions of such section, even if it contained a provision to the effect that, upon default in payment of any installment of interest, which interest is payable quarter annually, the whole amount of such note should thereby become due and payable. The note contains no such provision, but the accompanying mortgage, given to secure the payment of the indebtness and which was assigned to the appellee at the same time that the note was endorsed to it does contain such provision. *It cannot be successfully contend-*

ed, then, that such note was not negotiable or that the accompanying mortgage was not assignable." (Italics supplied.)

Similarly, in *Barker vs. Sartori, supra*, the Court, in deciding that under the Negotiable Instrument Law the note was "an unconditional promise or order to pay a sum certain in money", said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to the principal. *The argument made by counsel, that an installment may not be paid when due and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal where payable by installments.*" (Italics supplied.)

Since the Circuit Court ruled that the Negotiable Instruments Act codified the law merchant on this question, the Act itself can be considered as authority. It will be noted that section 2 (3) of the Negotiable Instruments Act, which we have cited above, clearly contemplates the payment of interest in installments before maturity, because it provides that the certainty of the sum is not affected by the provision for payment in installments and "that upon default in payment of any installment or of interest, the whole shall become due." The words "installment" and "interest" in the proviso obviously refer to the prior clauses (1) and (2). Thus, the proviso includes two contingencies that accelerate the payment of the balance of the principal. One is a "default in payment of any installment" of principal, and the other is a default in the pay-

ment of any installment "of interest." The only way in which there could be a default in the payment of interest before the balance of prineipal becomes due is if interest is payable in installments.

The decision of the Circuit Court is not only in conflict with all authority and the Negotiable Instrument Act, as above set forth, but it also is apparently in conflict with two analogous decisions of this Court. These decisions involved the question of whether one who acquired a negotiable bond after an installment of interest was unpaid, could be a holder in due course. Thus the issues in those cases went further than the mere question of the negotiability of the instruments, and this Court held that the purchasers were holders in due course of negotiable instruments:

Cromwell vs. County of Sac, 96 U. S. 51 (1877);
Railway Company vs. Sprague, 103 U. S. 756 (1880).

The Circuit Court of Appeals has attempted to rule out the significance of these cases to the issue presented in the instant case in that these cases involved bonds "with coupons attached." Manifestly this difference in fact exists, but merely pointing to such a difference is not sufficient to sweep away the efficacy of decisions of this Court.

A very convincing argument that the presence of coupons on the instrument has no effect is seen in the fact that in both of the above mentioned decisions of this Court, there was cited, with approval, the leading case on the question of whether one can be a holder in due course who acquires a promissory note after default in the payment of an installment:

National Bank of North America vs. Kirby, supra.

This early Massachusetts case, which was cited with approval by this Court, involved an ordinary *note without*

coupons attached. The presence or absence of coupons or of interest endorsements may possibly be construed to affect the question of whether one is a holder in due course but it does not in any way whatsoever affect the negotiability of the instruments.

It is submitted that the Circuit Court misinterpreted the law merchant, under which the negotiability of notes, providing for interest payable in installments before the maturity of principal, is conclusively established not only by all State authorities which are directly in point, but also by decisions of this Court which approved several of these State decisions. The decision of the Circuit Court should, therefore, be reviewed and reversed.

(b). Interest upon unpaid interest at a higher rate.

The Circuit Court of Appeals in rendering its decision joined this issue directly with the former issue and treated them exactly the same. Counsel for the Petitioner has found no case which has held that such interest provision renders a note non-negotiable. On the contrary, there are the following decisions, in each of which notes, providing for interest on principal at a given rate and interest on unpaid interest at a higher rate, were held negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

Thus, in *Lister vs. Donlan, supra,* the Court held a note is negotiable which "bears interest at six per cent per an-

num, payable annually, and contains this clause: 'Interest or principal not paid when due to draw interest thereafter at ten per cent per annum until paid.' ''

Similarly, in *Continental Bank vs. Jefferson, supra,* a note dated March 1, 1923, and providing as follows, was held negotiable:

> "March 1, 1924, after date, without grace, I promise to pay to the order of . . . $7,500.00 . . . with interest at the rate of 8 per cent per annum, payable semi-annually, from date until due.
>
> "Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum, payable semi-annually, until paid . . . ''

In *Barker vs. Sartori, supra,* the note read as follows:

> "Two years after date, without grace, for value received, I promise to pay to the order of W. the sum of $1,000.00 with interest, at the rate of 7% per annum from date until paid. Interest to be paid semi-annually, and if not so paid to bear interest after delinquency until paid at the rate of 9% per annum."

In upholding its negotiability the Supreme Court of Washington said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money."

A prior decision by even the Circuit Court of Appeals of the Third Circuit has held that interest payable semi-annually with a higher interest rate on unpaid interest does not render a note non-negotiable:

DeHass vs. Roberts, 70 F. 227 (C. C. A. 3rd, 1895).

The Court there said:

> "The note and coupons are mercantile instruments, not only according to the law of Kansas, by

> which the parties bound themselves, but according to the law merchant as well; and we deem it unnecessary to add anything to that the Court has so well said on the subject."

It is true that in that case there was involved a note with coupons attached, but, as it has been pointed out above, this fact is irrelevant where the issue is simply whether the instrument is a negotiable one.

One case which might, at the first blush, seem to oppose the cases upholding the negotiability of these notes is

First National Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929).

But in that case there was at one place a provision for interest at *eight* per cent on principal *until fully paid* and at another place a provision for interest at the rate of *ten* per cent on *deferred payments*, which would include both principal and interest not paid when due. It was on account of this apparent irreconcilability that the Pennsylvania Supreme Court held the note non-negotiable, saying:

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity."

It is this fact which shows that the *Bosler case* raises an issue entirely separate from that of the case at bar. The Court also said:

> "So, also, we have found others which say that a sum certain obtains, if one rate of interest is charged until maturity and a different rate thereafter. Under these latter cases, if the note in suit had said that interest was to be payable 'at the rate of eight per cent per annum from date until [maturity, not until] fully paid [as it in fact says] . . . deferred payments to

bear interest from maturity at ten per cent per annum,' it would have been negotiable."

Even assuming the correctness of the Pennsylvania decision, that there is an ambiguity or irreconcilability in the provisions of the *Bosler case,* it does not follow that that renders the note non-negotiable because "Ambiguities do not necessarily invalidate negotiability."

Goodrich, Certainty in Negotiable Paper. (1929), 2 Pa. Bar Ass'n. Quarterly 10, 13.

The Appellate Division of the New York Supreme Court recently refused to follow the *Bosler case* and decided that the identical notes were negotiable in

Lessen vs. Lindsey, 238 App. Div., 262, 264 N. Y. Supp. 391 (1933).

It must also be remembered that unlike the *Bosler case* the interest provisions of the notes in the principal case are by no means ambiguous or irreconcilable. They simply provide for interest on *principal* before and *after* maturity at the rate of seven per cent, and also provide for interest at a higher rate on deferred *interest* payments. But it will be observed that these notes do *not* provide for a higher rate of interest on *principal after* maturity, as did the *Bosler case.*

It is submitted, therefore, that the decision of the Circuit Court that under the law merchant the notes were not negotiable because of the interest provisions, is untenable and in conflict with all authority, and Petitioner prays that this Court review and conclusively adjudicate this important question of general law.

E. Conclusion.

This is a test case. The decision of the Circuit Court has rendered uncertain the negotiability of notes throughout the entire country. This uncertainty in the status of many millions of dollars of obligations in this form should not exist. As a result of the decision of the Circuit Court, the negotiability of similar notes is being attacked, and will be attacked, in suits pending in almost every state of the Union. It is for this reason that other counsel have joined with counsel for the Petitioner to have this Court conclusively adjudicate the status of these notes.

It has been shown that the decision of the Circuit Court is in direct conflict with a holding in another Circuit Court.

It has also been shown that the refusal by this Circuit Court to follow the decisions of the highest court of Florida interpreting the Florida Negotiable Instruments Act is probably erroneous because of: (1) decisions of this Court in the construction of the 34th section of the Judiciary Act; and (2) decisions of this Court involving the "full faith and credit" clause of the Constitution.

It has been indicated that the Circuit Court, in holding that under the law merchant the notes in suit were not negotiable, has probably erred because of: (1) decisions under the law merchant and prior to the Negotiable Instruments Act; (2) decisions subsequent to the Negotiable Instruments Act; (3) decisions of this Court, and (4) a decision of the Supreme Court of Florida where the cause of action arose.

Aside from the importance of the question of the negotiability of notes in a form which commerce has found to be expedient, and aside from the probable error of the Circuit Court, there must be taken into consideration the

effect of the decision of the Circuit Court as a precedent in every case in a federal jurisdiction where any kind of uniform or declaratory statute is involved. If the decision of the Circuit Court remains as a precedent unreviewed by this Court, it will be followed in other cases in the federal courts and will mean that no issue in the interpretation of any uniform statute shall ever be conclusively adjudicated until there has been a ruling by this Court on that issue.

For these reasons, it is submitted that this Court should grant the petition for a Writ of Certiorari.

Respectfully submitted,

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